

**501 KAR 1:070. Conducting sex offender postincarceration supervision revocation hearings.**

RELATES TO: KRS 439.330, 439.340(3), 439.341, 439.346, 439.430, 532.043, 532.060(3)

STATUTORY AUTHORITY: KRS 439.330(1)(e), 439.340(3), 439.430

NECESSITY, FUNCTION, AND CONFORMITY: KRS 439.330(1)(e) requires the board to issue warrants and conduct hearings for persons charged with violations of postincarceration supervision. KRS 439.340(3)(b) authorizes the board to promulgate administrative regulations with respect to matters that come before it. This administrative regulation establishes the procedures for the revocation of sex offender postincarceration supervision and the issuance of warrants.

Section 1. Preliminary Revocation Hearings. (1) Notice of the violation of one (1) or more of the conditions of a sex offender's postincarceration supervision shall be reported to the board by a probation and parole officer of the Department of Corrections by serving the board and the offender, if the offender's location is known, with a written notice of preliminary hearing which sets forth the alleged violation or violations.

(a) This notice may be amended at any time prior to the close of the record of the preliminary hearing, within the discretion of the administrative law judge, if a finding is made that the substantial rights of the offender will not be prejudiced by the amendment.

(b) If the notice is amended, a continuance of the proceeding may be granted if the interest of justice so requires.

(c) Failure to object to any defect in the notice prior to the close of the hearing shall be deemed a waiver of this objection.

(2) Any duly appointed probation and parole officer of the Commonwealth of Kentucky may appear before the board or its administrative law judge as representative of the Department of Corrections in matters relating to the revocation of sex offender postincarceration supervision; except that the probation and parole officer shall not make opening or closing arguments, conduct direct examination or cross-examination of witnesses, or take any other action that would constitute the unauthorized practice of law.

(3) A preliminary hearing shall not be conducted earlier than five (5) days after service of notice of the hearing, unless the waiting period is waived by the offender, in writing.

(4) The preliminary revocation hearing shall be an evidentiary hearing conducted on the record.

(a) The preliminary hearing shall be electronically recorded and maintained in accordance with the records retention schedule established by the Kentucky Department of Libraries and Archives.

(b) If requested by the board, the record of the proceedings shall be transcribed.

(c) At the preliminary hearing, the offender shall present all evidence the offender desires to make part of the administrative record.

(d) Except as provided by Section 3 of this administrative regulation, the record shall not be supplemented with any new or additional evidence after the conclusion of the preliminary hearing.

(5) The preliminary hearing shall be conducted by an administrative law judge of the Parole Board who meets the qualifications set forth in KRS 439.341.

(a) The administrative law judge may take judicial notice of acts of the Parole Board, including the conditions of sex offender postincarceration supervision and all other matters which may be judicially noticed in the courts of this Commonwealth pursuant to KRE 201.

(b) Witnesses appearing at the preliminary hearing to give testimony shall do so under oath,

administered by the administrative law judge, and shall be available for examination by the other party or the administrative law judge, unless good cause dictates otherwise.

(c) Hearsay evidence may be presented and admitted into the record, at the discretion of the administrative law judge.

(d) The probation and parole officer shall bear the burden of proof in establishing the elements of the violation.

(e) The probation and parole officer shall present evidence first and the offender shall be given the opportunity to present evidence in defense or mitigation.

(f) Any further proceedings shall be conducted at the discretion of the administrative law judge.

(g) The offender may, within reasonable limits, present evidence solely for the purpose of mitigation of his conduct, including evidence of his mental condition. If presented, this evidence shall be subject to rebuttal by the probation and parole officer.

(h) The preliminary hearing may be continued or recessed with further proof to be taken at any time prior to the close of the record for good cause shown.

(i) At the request of either party, the administrative law judge may, within his discretion, leave the record open for reception of additional evidence if no substantial rights are prejudiced.

(6) At the close of the hearing, or within a reasonable time thereafter, the administrative law judge shall make a determination, from the evidence produced at the hearing, as well as any evidence of which judicial notice is taken, whether there exists probable cause to believe that the offender has committed any or all of the violations alleged in the notice of preliminary hearing.

(a) If probable cause is found to exist:

1. Except as provided by paragraph (b) of this subsection, the case shall be referred to the Parole Board which shall then issue a sex offender postincarceration supervision violation warrant pursuant to Section 2(1)(a) of this administrative regulation, which shall cause the offender to be brought before the Parole Board for a final sex offender postincarceration supervision revocation hearing; and

2. The administrative law judge shall issue a written decision and may issue a recommendation, along with reasons in support of that recommendation, as to what action should be taken concerning the revocation of sex offender postincarceration supervision and return of the offender as a sex offender postincarceration supervision violator. This recommendation shall be advisory only and shall not be binding on the board.

(b) If the administrative law judge finds that there exist substantial mitigating factors, the administrative law judge may recommend that the offender not be returned as a sex offender postincarceration supervision violator.

1. If the administrative law judge makes that finding and recommendation, the case shall be referred to the Parole Board for their vote on the issuance of the sex offender postincarceration supervision violation warrant pursuant to Section 2(2) of this administrative regulation.

2. If the Parole Board votes to issue the warrant, the offender shall be brought before the Parole Board for a final sex offender postincarceration supervision revocation hearing in the same manner as provided in subsection (6)(a) of this section.

(7) A preliminary hearing shall not be required if the offender has received a new conviction for a crime committed while on sex offender postincarceration supervision. Proof of the conviction shall establish a presumption of probable cause of a violation of the conditions of the sex offender's postincarceration supervision.

(a) Upon receipt by the Parole Board from the Commissioner of the Department of Corrections or designee of a written request to schedule a final hearing because an offender has re-

ceived a new conviction for a crime committed while on sex offender postincarceration supervision, the board may issue a warrant pursuant to Section 2 of this administrative regulation and schedule the offender for a final hearing under Section 3 of this administrative regulation.

(b) The written request for issuance of the warrant shall be accompanied by proof of the new criminal conviction for the offender's crime committed while on sex offender postincarceration supervision.

(c) At a final hearing scheduled by the board pursuant to paragraph (a) of this subsection, the board shall provide the offender a reasonable opportunity to present evidence in mitigation and evidence, if any, that the offender was not convicted of a crime while on sex offender postincarceration supervision.

(8) A preliminary hearing shall not be required for an offender who waives his right to a preliminary hearing and admits to one (1) or more alleged violations of the conditions of the offender's postincarceration supervision if:

(a) The offender appeared before an administrative law judge of the Parole Board and waived his right to a preliminary hearing on the record; or

(b) The offender was being supervised in another state or jurisdiction pursuant to the Interstate Compact when the alleged violation occurred, and it can be shown that the offender appeared before an administrative law judge, hearing officer, or other official authorized to conduct administrative hearings in the supervising state and waived his right to a preliminary hearing in a manner consistent with the requirements of the Interstate Compact and due process.

1. Upon receipt of notice and documentation from the commissioner of the Department of Corrections or designee that an offender supervised in another state pursuant to the Interstate Compact has waived his right to a preliminary hearing, the board shall forward the notice and documentation to an administrative law judge of the board.

2. The administrative law judge shall review the waiver to determine if the waiver meets the requirements of subsection (8)(b) of this section. If the administrative law judge determines that the waiver does not comply with subsection (8)(b) of this section, the Parole Board Chair or designee shall refer the matter back to the administrative law judge for a preliminary hearing or to the Division of Probation and Parole to request that action be taken to ensure compliance with this administrative regulation.

(9) An offender supervised in another state pursuant to the Interstate Compact at the time of a violation of the offender's postincarceration supervision who waives his right to a preliminary hearing in the supervising state and is subsequently returned to Kentucky to the custody of the Department of Corrections shall be deemed to have waived any right for the preliminary hearing to take place in or near any community outside Kentucky where the violation is alleged to have occurred, or at any location outside Kentucky where the offender was taken into custody.

(10) In any preliminary revocation hearing in which the releasing authority is other than the Kentucky Parole Board, upon a finding of probable cause, the matter may be referred to the releasing authority for further revocation consideration on the same basis as a case in which the Kentucky Parole Board is the releasing authority.

(11) Any party appearing before an administrative law judge of the Kentucky Parole Board may be represented by counsel if he so desires. The party may have, upon motion thereof, a continuance for the purpose of obtaining the presence of counsel; except that chronic appearance for hearing without counsel by an offender who is capable of retaining counsel may be deemed an implicit waiver of counsel.

(12) The administrative law judges, in the absence of any specific statutory authorization, shall not consider matters of bail or any other form of release from custody for those persons accused of a violation of a condition of sex offender postincarceration supervision.

Section 2. Sex Offender Postincarceration Supervision Violation Warrants. Sex offender postincarceration supervision violation warrants shall be issued as follows:

(1) A vote of a majority of a quorum of the full board shall be required before a sex offender postincarceration supervision revocation warrant is issued, except that:

(a) If a case is referred to the Parole Board by the administrative law judge under Section 1(6)(a)1 of this administrative regulation for a final hearing, with a finding of probable cause of a violation of a condition of sex offender postincarceration supervision, the Parole Board chair or designee shall issue a sex offender postincarceration supervision violation warrant to bring the offender before the board for a final hearing.

(b) If it appears that an offender has absconded from sex offender postincarceration supervision, it otherwise appears that an offender is a fugitive from justice, or a sex offender postincarceration supervision violation warrant is necessary to effect the return of the offender to the state of Kentucky, the Parole Board chair or designee may issue a warrant if:

1. The board receives documentation from the supervising probation and parole officer setting forth facts sufficient to conclude there are reasonable grounds to believe that some violation has occurred; and

2. The commissioner or designee submits to the board a recommendation that a warrant be issued.

(c) If a vote of the board would otherwise be required to issue a sex offender postincarceration supervision violation warrant, except there is not a quorum of the board present to vote whether probable cause exists and the warrant should be issued, any member of the Parole Board may issue a sex offender postincarceration supervision violation warrant if, upon review, the board member determines that probable cause exists to issue the warrant.

1. If a warrant is issued under these circumstances, the board shall vote, as soon as is reasonable, on whether or not to concur in the issuance of the warrant.

2. If a majority of a quorum of the board does not concur, the warrant shall be voided by the board.

(2) If a case is referred to the Parole Board by the administrative law judge under Section 1(6)(b) of this administrative regulation, with a recommendation that the offender not be returned to the institution for a violation of a condition of sex offender postincarceration supervision, the board may issue a sex offender postincarceration supervision violation warrant, if upon review a majority of a quorum of the board concurs that probable cause exists to believe a sex offender postincarceration supervision violation has taken place. If a majority of a quorum of the board votes to issue the warrant, the warrant shall be issued.

(3) If the offender is being supervised outside the state of Kentucky, a sex offender postincarceration supervision violation warrant may be issued if:

(a) There is a vote of the Parole Board based upon a written report from the supervising state setting forth facts sufficient to conclude that there are reasonable grounds to believe that a violation of a condition of sex offender postincarceration supervision has occurred; and

(b) The commissioner or designee submits to the board a request or recommendation that a warrant be issued.

(4) The board may decline any request for a sex offender postincarceration supervision violation warrant made pursuant to any section of this administrative regulation except subsection (1)(a) of this section. Any warrant, issued under any section of this administrative regulation, may be rescinded by majority vote of the board at any time.

(8) After the issuance of a warrant has been approved as provided by this section, any board member may sign the warrant.

Section 3. Final Revocation Hearings. At the final sex offender postincarceration supervision

revocation hearing:

(1) The Parole Board shall determine what action should be taken concerning the revocation of sex offender postincarceration supervision and return of the offender as a sex offender postincarceration supervision violator.

(2) The charges specified in the warrant shall be explained to the offender and the offender shall be given the opportunity to admit or deny them.

(3) The evidence shall be limited to the administrative record made before the administrative law judge, except that if the offender wishes to present new or different evidence or information than the offender presented at the preliminary hearing:

(a) The board may consider any new evidence or information submitted by the offender in writing and in advance of the final revocation hearing.

(b) The offender may request a special hearing for the presentation of new or different evidence or information.

1. The request for a special hearing shall be made by the offender no later than at the beginning of the final hearing.

2. The grant or denial of a special hearing shall be totally within the board's discretion.

3. The board may grant a request for a special hearing if the board finds that the new or different evidence or information is relevant to the proceeding, and that it could not have been presented at the preliminary hearing.

(4) If a request for a special hearing is granted by the board:

(a) A short continuance may be granted so that the special hearing can be scheduled.

(b) The special hearing shall take place at the central office of the board, unless the board designates another site.

(c) At the special hearing, the following order of proceedings shall be followed:

1. The offender, parole officer, and all witnesses shall be sworn in by the Parole Board.

2. The board shall present a short statement of the charges against the offender.

3. The parole officer shall present proof to substantiate the charges, subject to cross-examination by the offender.

4. The offender may present proof to rebut the parole officer's charges, subject to rebuttal evidence and testimony by the parole officer.

5. The parole officer may put on any rebuttal proof subject to cross-examination.

6. The board may question both the offender and the parole officer and any witnesses.

(d) After the conclusion of the special hearing, the board shall make a determination as to whether to revoke the offender's sex offender postincarceration supervision, and notify the offender in writing, as provided by subsection (5) of this section.

(5) At the conclusion of the final hearing, the board shall make a determination of whether to revoke the offender's sex offender postincarceration supervision or to return the offender to supervision.

(a) The offender shall be given written notification of the board's decision no later than twenty-one (21) days from the date of the decision. The time period may be extended by the board for good cause, in which case the board shall document the reason for the time extension.

(b) If the board votes to revoke the sex offender postincarceration supervision and return the offender as a sex offender postincarceration supervision violator, the offender shall be returned to the custody of the Department of Corrections for the remaining period of sex offender postincarceration supervision.

Section 4. Reconsideration. An offender whose sex offender postincarceration supervision is revoked by the board, or the offender's authorized legal representative, may request reconsideration review of the decision by the board.

(1) A request for reconsideration shall be in writing and shall be postmarked no later than twenty-one (21) days from the date the final disposition is made available to the inmate. If the request is not postmarked within twenty-one (21) days, it shall be denied.

(2) The request shall be screened by the board chairperson or designee to decide if a reconsideration hearing shall be conducted by the full board.

(3) A reconsideration hearing shall not be granted except for one (1) or more of the following reasons:

(a) If there is an allegation of misconduct by a board member that is substantiated by the record;

(b) If there is a significant procedural error by a board member; or

(c) If there is significant new evidence that was not available when the hearing was conducted. A request based on the availability of new evidence or information shall be accompanied by adequate documentation.

(4) A request based on an allegation of misconduct or significant procedural error shall clearly indicate the specific misconduct or procedural error.

(5) If the request for reconsideration is granted pursuant to this section, the following procedures shall apply:

(a) The case shall be set for a reconsideration hearing by the full board at a meeting at which a quorum of the board is present.

1. The reconsideration hearing shall be conducted from the record of the first hearing.

2. The appearance of the inmate shall not be necessary.

3. If a board member wishes to have additional testimony, an appearance hearing may be conducted.

(b) The board shall vote after reviewing the case.

1. A decision to change the result of the hearing that is the subject of the reconsideration shall require a majority vote of a quorum of the board.

2. The decision of the board shall be final.

Section 5. Modification of Conditions of Sex Offender Postincarceration Supervision. (1) If the board has established or imposed conditions of a sex offender's postincarceration supervision, the offender may request the modification or removal of a condition or fee through the offender's assigned probation and parole officer.

(2) Any request for modification or removal of a condition shall be decided by vote of a majority of a quorum of the full board.

(3) The offender shall be given written notification of the board's decision no later than twenty-one (21) days from the date of the decision. The time period may be extended by the board for good cause, in which case the board shall document the reason for the time extension. (37 Ky.R. 1936; 2382; eff. 5-6-2011.)